80-902

No. .....

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

In the Matter of the Application for Admission to the New York State Bar of

FRANCIS G. FLEMING,

Appellant.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

JURISDICTIONAL STATEMENT

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Attorney for Appellant

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PAUL S. EDELMAN
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I. Questions Presented

1. Can a State, in the exercise of discretion, summarily and arbitrarily deny the application of an attorney for admission to the Bar without examination (based upon his admission for five years in another state) without informing him of the basis of the denial and in the absence of guidelines limiting the exercise of discretion?

2. If the unarticulated reason for a State's denial of an attorney's admission to the Bar is his *residence* while admitted in another state, is not this criterion substantively unrelated to any governmental interest of the State and an improper reason for denying licensure, particularly when residence is specifically exempted as a criterion if the attorney is employed by the federal government?

3. If the unarticulated reason for the State's denial of an attorney's admission to the Bar is his *residence* while admitted in another state, does not utilization of such a criterion by the State impermissively chill the right to relocate among the several states?

4. Does not a State unconstitutionally discriminate against interstate commerce if it refuses licensure to an attorney who, while admitted in Pennsylvania and Arizona, actually practices and is employed in New York, if the State would grant licensure to that attorney if he resided where admitted and chose not to accept out of state employment?

II. Parties

The decision appealed was rendered by the New York Court of Appeals in appellant's *ex parte* and unopposed application for an order required for his admission to the Bar of the State of New York. There were no adverse parties below; 28 U.S.C. § 2403 may be applicable.

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ON APPEAL FROM THE NEW YORK COURT OF APPEALS

JURISDICTIONAL STATEMENT

IV. Opinions Below

Notice of the decision of the New York Court of Appeals is attached hereto as part of the Appendix. See Appendix at 1a and 4a. No official or unofficial opinion or report has been issued or published by the New York Court of Appeals. The decision was communicated to appellant by the Clerk of the New York Court of Appeals in correspondence dated July 14, 1980 and, after appellant's request for rehearing, by letter dated September 4, 1980. See Appendix at 1a and 4a.

V. Statement of Jurisdiction

A. Nature of Proceeding

This appeal involves the denial of appellant's application for an order needed to obtain admission to the Bar of

New York State.[1] Pursuant to *N.Y. Judiciary Law*, § 90(b), an attorney who has been admitted for at least five years to the highest court of another state or common law jurisdiction, and who possesses the requisite character and moral fitness, "shall" be admitted to the New York State Bar on motion without examination upon compliance with the Rules of the New York Court of Appeals. See Part VI *infra*.

The pertinent rules provide that an attorney must:

1. be over 26 years of age,

2. have the equivalent of the legal education needed to qualify him to take the bar examintion,

3. be admitted to practice in the "highest law court" of another state or common law jurisdiction, and

4. *while admitted* to practice, has *actually practiced* for a period of at least five years either:

   a. in the highest law court where admitted;

   b. in federal legal service;

   c. in legal service to a corporation; or

   d. "in a combination or cumulation of service among the above categories of practice or legal service, even if the government service, civilian or military, was not in a jurisdiction in which the applicant was admitted to practice, where the Court of Appeals has determined that such five years of combined or cumulative service is the *equivalent* of the practice [described in subpart (a)]." 22 N.Y.C.R.R. § 520.7(a)(2)(i)(d).[2] (emphasis added)

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[1] The order sought was a prerequisite for admission. Refusal to issue the order amounts to a denial of admission. See Part VI, *infra*.

[2] The rules also provide for admission without examination for full time law school faculty members who have achieved the rank of professor or associate professor without regard to residence.

Appellant was admitted to practice in the Supreme Court of Pennsylvania on November 18, 1974, but his "actual practice" consisted of:

1. approximately 10½ months (following admission) as a law clerk for a Senior U.S. District Court Judge;

2. approximately 15 months as an Assistant Attorney General for the State of Arizona (12 of which occurred after his admission in Arizona);

3. approximately 30 months as a full time Associate in a law firm located in Phoenix, Arizona (all of which occurred subsequent to his admission in Arizona); and

4. five and one-half months as a full time Associate in his present New York law firm where he actually practiced in numerous federal and state (including Arizona and Pennsylvania) courts, and administrative agencies.

A verified application was submitted to the New York Court of Appeals on June 30, 1980, see Appendix at 8a-11a, along with affidavits of the appellant's employers and supervisors, detailing the qualitative nature of the applicant's experiences. The application sought a determination that appellant's combined experience was the "equivalent" of actual practice in Pennsylvania.[3]

The application was denied. No hearing, argument or interview was conducted. No basis for the denial, despite a specific request, was given. This appeal followed.

B. There is No Opinion

No formal judgment, order or opinion was entered despite appellant's specific request for one (See Appendix

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[3] Inasmuch as New York now utilizes the Multi-State Exam, the application alternatively requested that the Court consider appellant's previous Multi-State Bar Exam scores. This request was also denied.

at 3a). The Clerk of the New York Court of Appeals simply informed appellant that the application had been denied by letter dated July 14, 1980. See Appendix at 4.

Thereafter, appellant requested reconsideration of the decision on August 14, 1980, and also requested that if the application was again denied, some articulation of the reasons be given and a formal order or judgment be en-
denied by letter dated July 14, 1980. See Appendix at 4a.
tered (See Appendix at 2a-3a). The final decision was communicated by letter dated September 4, 1980. See Appendix at 1a. A Notice of Appeal was filed on November 26, 1980 with the Clerk of the New York Court of Appeals, along with proof of service upon each of the Judges of the Court and the New York Attorney General. See Appendix at 5a-7a.

C. Jurisdiction of this Court is based upon 28 U.S.C. § 1257(2)

1. A Court Rule is a State Statute for Purposes of this Appeal

A Court rule regulating the admission of attorneys is deemed to be a state statute within the meaning of 28 U.S.C. § 1257(2) if the state gives the rule the force of law. In *Lathrup* v. *Donahue,* 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d (1961), a Wisconsin State Bar rule, promulgated by the Wisconsin Supreme Court, requiring the payment of annual dues was held to be a "statute" within the meaning of 28 U.S.C. § 1257(2):

> "We think that the order is a 'statute' for the purposes of § 1257(2). Under that section, the legislative character of challenged state action, rather than the nature of the agency of the State performing the act, is decisive of the question of jurisdiction. It is not necessary that the state legislature itself should have taken the action drawn in question. In construing the similar jurisdictional provision in the Judiciary Act of 1867, 14 Stat. 385, we said: *'Any enactment,* from

> whatever source originating, *to which a State gives the force of law* is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this court.' Williams v Bruffy, 96 US 176, 183, 24 L ed 716, 717. We likewise said of the provision of the Act of 1925, 43 Stat. 936, which is the present § 1257(2): '. . . the jurisdictional provision uses the words "a statute of any State" in their larger sense and is not intended to make a distinction between acts of a state legislature and other exertions of the State's law-making power, but rather to include every act legislative in character to which the State gives its sanction.' " *Id.* at 824 (emphasis added).

See also, In re Griffiths, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed. 910 (1973).

2. The Validity of New York's Interpretation of the Rule was Drawn In Question

Appellant's application to the New York Court of Appeals expressly challenged the constitutionality of what was believed to be an anachronistic interpretation of the rules requiring that an attorney *reside* where he was admitted in order to qualify for admission. Appellant argued that the two cases interpreting the rule in this fashion had been abrogated by subsequent amendment; but if not, it was expressly contended that using residence as a criterion would be unconstitutional. It was expressly contended that residence was substantively unrelated to competency, that it was "unfairly arbitrary in relation to any regulatory purpose", See Appendix at 13a, and that residence as a criterion unconstitutionally penalized appellant's exercise of the fundamental right to move among the states. See Appendix at 13a-14a. Thus, "the ground [of invalidity was] brought to the attention of the State Court with fair precision and in due time." *Street* v. *N.Y.*, 394 U.S. 576, 584, 22 L.Ed. 572, 580, 89 S.Ct. 1354 (1968).

There is no New York statute, court rule or case law authority which requires more specificity. *Id.*

The fact, therefore, that New York applied the residency requirement to appellant's application "as against the contention that such application [was] invalid on federal grounds," *Japan Lines, Ltd.* v. *County of Los Angeles,* 414 U.S. 434, 441, 99 S.Ct. 1813, 60 L.Ed.2d 336, 343 (1979), establishes that the validity of the statute and court rule was drawn in question within the meaning of 28 U.S.C. § 1257(2).[4] The Court of Appeals decided against all appellant's arguments. *See, Cox Broadcasting Corp.* v. *Cohen,* 420 U.S. L.Ed.2d, 328, 338, 95 S.Ct. 1029 (1975). The effect of the decision was to deny the constitutional claims; hence, those claims are reviewable in this Court pursuant to 28 U.S.C. § 1257(2). *Bryant* v. *Zimmerman,* 278 U.S. 63, 67, 73 L.Ed. 184, 187, 49 S.Ct. 61, 62 A.L.R. 785 (1928).

3. There is No Adequate Non-Federal Ground to Support the Decision

No adequate independent non-federal ground exists to support the decision. Although the Court theoretically could have evaluated appellant's experience and determined that it failed to manifest sufficient competency, no attempt to analyze the nature of appellant's experience was made. No hearing was conducted; no consideration was given to appellant's prior bar examination results. No request for his academic record was made. Moreover, New York does not attempt to evaluate an attorney's experience. It is necessary only that he have the "right" to practice in the highest court where he is admitted, and that

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[4] The precise basis of the decision is not set forth, despite appellant's request for some articulation of its basis. The validity of this procedure is also challenged in this appeal, and the question should be before this Court because it was impossible to raise before this appeal.

he *reside* there. *In Re Harvey,* 309 N.Y. 46, 127 N.E.2d 801 (1955) announced that:

> "One who seeks admission to our Bar without examination because he has been a member of the Bar of another state (or the District of Columbia) must have resided continuously or substantially so in that other jurisdiction for five years. As to the five years of 'practice' in the foreign jurisdiction that means admission to the Bar with the right to practice in that jurisdiction's highest court" *Id.* at 48, 127 N.E.2d at 802.

See also *Shaikh* v. *Appellate Division,* 39 N.Y.2d 676, 385 N.Y.S.2d 514, 350 N.E.2d 902 (1976).

The denial of appellant's application, if it can be explained at all, had to be based upon the residence rule. Clearly, no other substantial or sufficient state ground explains the denial. It is:

> "well settled that if the independent ground was not a substantial or sufficient one, 'it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction.' [citations omitted]. Thus in *Maguire* v. *Tyler* [citation omitted], it was contended that the judgments rested on adequate state grounds. In neither was there an opinion of the state court. The Court examined the record, found the state grounds not substantial or sufficient, and reversed the judgments on the federal question." *Williams* v. *Kaiser,* 330 U.S. 470, 478, —— S.Ct. ——, 89 L.Ed. 398, 404 (1944).

An examination of the record in this matter also reveals the absence of an adequate independent non-federal ground to support the decision.

VI. Constitutional Provisions, Statutes and Court Rules Involved

U.S. Const., Amend XVI

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.Y. Judiciary Law, § 90(b)

b. Upon the application, pursuant to the rules of the court of appeals, of any person who has been admitted to practice law in another state or territory or the District of Columbia of the United States, or in a foreign country, to be admitted to practice as an attorney and counsellor-at-law in the courts of this state without taking the regular bar examination, the appellate division of the supreme court in the department in which such person is an actual resident at the time of such application, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law, in all the courts of this state, provided, that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

Rules of the N.Y. Court of Appeals

(a) *General.* In its discretion the Appellate Division may admit to practice without examination an applicant who:

(1) has been admitted to practice in the highest law court in any other state or territory of the United States or in the District of Columbia or has been admitted to practice as an attorney and counselor at law

or the equivalent in the highest court in another country whose jurisprudence is based upon the principles of the English Common Law; and

(2) (i) while admitted to practice as specified in paragraph (1) of this subdivision, has actually practiced for a period of at least five years:

(*a*) in its highest law court or highest court of original jurisdiction in the state or territory of the United States, in the District of Columbia or in the common law country where admitted; or

(*b*) in Federal military or civilian legal service in a position which requires admission to the bar for the appointment thereto or for the performance of the duties thereof; or

(*c*) in legal service as counsel or assistant counsel to a corporation in the state or territory of the United States, the District of Columbia or in the common law country where admitted; or

(*d*) in a combination or cumulation of service among the above categories of practice or legal service even if the government service, civilian or military, was not in a jurisdiction in which the applicant was admitted to practice, where the Court of Appeals has determined that such five years of combined or cumulative service is the equivalent of the practice required in clause (a) of this subparagraph;

(3) has had the substantial equivalent of the legal education which would have been required under section 520.3 of this Part, or its predecessor section or sections, to qualify applicant to take the New York State bar examination at the time of applicant's admission to practice in such other state, territory, district or common law country, or at the time of application for admission under this section; and

(4) is over 26 years of age. 22 N.Y.C.R.R. § 520.7(a)

VII. Statement of the Case

A description of the proceedings below, how the questions were raised and how they were passed on is described in Parts I, II, IV and V of the Jurisdictional Statement. In order to be concise, they will not be repeated at this time.

The uncontroverted facts in the record below demonstrated that appellant, a graduate of Villanova University School of Law, Class of 1974, and Associate Editor of the *Villanova Law Review,* prepared for and successfully passed the Pennsylvania Bar Examination in July of 1974. At the time, it incorporated the National Conference of Bar Examiners/Educational Testing Service Multi-State Bar Examination (hereinafter Multi-State Bar Exam). He was admitted to the Bar of the Supreme Court of Pennsylvania on November 18, 1974, having achieved a scaled score of 160 (200 is the maximum). Shortly before that, on September 1, 1974, he commenced employment as the law clerk for the Honorable Edwin D. Steel, Jr., District Court Judge for the District of Delaware. During this time, he was employed in Delaware and resided in Pennsylvania; but apparently, this experience is suffcient for purposes of the Court Rules because appellant was employed by the federal government. 22 N.Y.C.R.R. § 520.7(a)(2)(i)(d).

On September 1, 1975, appellant relocated from Pennsylvania to Arizona. He commenced employment with the Office of the Attorney General for the State of Arizona on September 15, 1975 after having prepared for and taken the July 19, 1974 Arizona Bar Examination, which also included the Multi-State Bar Exam. On December 18, 1975, petitioner was admitted to the Supreme Court of the State of Arizona after having successfully passed his second bar examination with a scaled score of 166.

Appellant continued to reside and to practice law in the State of Arizona until June 1, 1979, five years following his graduation from law school and four and one-half years following the anniversary of his initial admission to

the Pennsylvania Bar. Then, he commenced employment in New York City with Kreindler & Kreindler in order to participate in his chosen area of expertise, aviation accident litigation.[5] Since June 1, 1979, appellant's clients have been residents of numerous states and countries. The matters he has been handling arise out of instrumentalities involved in air transportation, hence, instrumentalities of interstate commerce. Almost all aviation accidents are investigated by the federal government. Appellant has participated in hearings relating to these investigations. All of appellant's cases since June 1, 1979, if filed, have been brought or are pending either in U.S. District Courts, where he has obtained admission *pro hac vice* if necessary or in Arizona or Pennsylvania state courts. *It is this experience which is apparently insufficient* by New York standards.

Following November 18, 1979, the fifth anniversary of appellant's admission to the Bar of Pennsylvania, a verified petition was submitted to the New York Court of Appeals seeking admission to the Bar of the State of New York. The application was supported by affidavits of employers, all of whom recommended his admission to the Bar, as well as certificates of the Clerk of the Supreme Courts of Arizona and Pennsylvania certifying his admission to those Courts.

The application was denied, summarily without hearing or explanation. Although no reason was given, the only cogent explanation is that the application was denied because appellant did not *reside,* in Arizona or Pennsylvania, *where he was admitted* during the last five and one half months of the five years following his initial admission.

The appeal challenges the use of this criterion for this purpose.

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[5] Appellant's undergraduate college degree is in civil engineering and he was a military pilot before law school. Employment in aviation litigation with Kreindler & Krendler is a unique opportunity for him; obviously, accepting this employment required that he relocate to New York.

VIII. The Quesitons Presented Are Substantial

This appeal presents this Court with the opportunity to consider one of the key aspects of state regulation of the practice of law, namely, admission to the Bar. There has been much criticism of the level of competence generally manifested by members of the Bar, particularly before this Court, but little attention has been paid to *how* competence is determined from state to state. This appeal concedes that a State has a right to evaluate an attorney's competence; it challenges the arbitrariness of one of the methods used. It asserts that ignoring qualitative indications of an attorney's competence and focusing upon an arbitrary factor, such as residence, is no more than a disguise of a protectionist trade barrier, and it amounts to an abrogation of the State's role in assuring professional competency. No substantive relationship between residence and competence exists; yet using residence as a factor penalizes those engaged interstate commerce who have had to move from state to state. Acquiescence to the utilization of criteria such as residence, therefore, probably fosters some of the professional mediocrity observed. Attention and analysis should be focused on this situation.

Furthermore, the second or third bar examination score attained by an attorney is of dubious importance, if the first score is known and the test is standardized. Assuming that passing a bar examination for the first time manifests some academic or intellectual capacity (over and above that manifested by successful selection among superlatively qualified individuals for entry to and graduation from an accredited law school whose standards and facilities are continually maintained and reviewed), what do multiple and repetitive successes indicate? Yet, passing a bar examination requires a substantial commitment of time and resources. In appellant's case, it would be the third time the effort is made, two too many. Can the burden imposed by the requirement to pass a successive bar examination

be fairly imposed in light of its dubious significance, particularly now that most states use the standardized objective national Multi-State Bar exam? But also, is not evaluating competency solely on this basis a charade? Does not this mechanism waste resources, provide illusory protection to the public and misfocus and distract the state from its obligation to actually evaluate the competency of those who practice law?

When one considers that this arbitrary standard is used at great cost to the individual to whom it is applied, in deprivation of federal privileges and immunities, and as a result of broaching the limitations imposed by the Constitution upon the exercise of the police power, it must be concluded that the matter is substantial.

Lastly, the questions presented by this Appeal are important because of the recent articulation by this Court of the important principle that the regulation of the profession of law is not exempt from limitations deriving from federal law. *Bates, et al.* v. *State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed. 2d 810 (1977); *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975). The appeal presents the Court with the opportunity to clarify some of the questions relating to the relationship of the states and the federal government in this area, and to reinforce the federal and local objectives in regulation of the profession which serve a legitimate purpose.

CONCLUSION

Wherefore, it is respectfully submitted that this Court has jurisdiction of this appeal under Section 1257(2), Title 28, United States Code, probable jurisdiction should be noted, and plenary consideration of the questions presented is appropriate.

Respectfully submitted,

Lee S. Kreindler
Kreindler & Kreindler
99 Park Ave.
New York, N.Y. 10016

Certificate of Service.

FRANCIS G. FLEMING, a member of the Bar of the United States Supreme Court, whose entry of appearance in this cause is being contemporaneously filed with the Clerk of the United States Supreme Court, being first duly sworn and placed upon his oath states that forty copies of the Jurisdictional Statement addressed to the Clerk of the U.S. Supreme Court, Washington D.C. 20543 and three copies of the Jurisdictional Statement were deposited December 2, 1980 in a U.S. Post Office or mail box with first-class postage prepaid, addressed to each of the following persons:

Clerk of the Court
New York Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

Honorable Lawrence H. Cooke
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Monticello, New York 12701

Honorable Matthew J. Jasen
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Buffalo, New York 14202

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Albany, New York 12224

FRANCIS G. FLEMING

Sworn to before me this
2 day of December, 1980

SONIA AGUIRRE
Notary Public
State of New York
No. 01A5056610
Qualified in Rockland County
Cer. Filed in New York Cty.
Commission Expires March 30, 1982

Letter dated September 4, 1980, Court of Appeals, State of New York, to Francis Gerard Fleming.

STATE OF NEW YORK
COURT OF APPEALS

(SEAL)
JOSEPH W. BELLACOSA
Clerk of the Court

Clerk's Office
Albany 12207
September 4, 1980

Mr. Francis Gerard Fleming
99 Park Avenue
New York, New York 10016

Dear Mr. Fleming:

I acknowledge receipt of your letter of August 14, 1980. Please be advised that the July 14, 1980 denial of your application for a determination regarding combined or cumulative practice of law for admission without examination included a denial of your alternative request that the Court grant relief on the basis of your previous Multi-State Bar examination scores combined with your practice experience. The Court does not issue orders or judgments of denial of applications for waiver under 22 NYCRR Part 520.

Very truly yours,

JOSEPH W. BELLACOSA
Joseph W. Bellacosa

AO'B:tab

Letter dated August 14, 1980, Kreindler & Kreindler, to Clerk of the Court of Appeals.

KREINDLER & KREINDER
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CABLE "KREINDLAIR NEW YORK"

TELEX: 14-8305

Letter dated August 14, 1980, Kreindler & Kreindler, to Clerk of the Court of Appeals.

August 14, 1980

Mr. Joseph W. Bellacosa
Clerk of the Court
New York Court of Appeals
Albany, New York 12027

Re: In the Matter of the Application of
Francis Gerard Fleming for Admission
to the Bar Without Examination

Dear Mr. Bellacosa:

On July 14, 1980, I received a letter from you indicating that my "petition" had been denied by the Court of Appeals. However, my Petition sought admission without examination on the basis of my five years experience as an attorney, *or, in the alternative,* a waiver of strict compliance regarding admission by examination based upon the fact that I have previously successfully passed two Multi-State Bar Examinations.

I am uncertain as to whether or not the Court intended to deny the entirety to my application because your letter only refers to a request for a "waiver of strict compliance with the practice requirement". Furthermore, I have not received any information or notice regarding the reason why the application was denied.

Therefore, I request reconsideration of my application, and if it is denied, I request some formal articulation of the basis of the denial and a judgment or order.

Sincerely,

FRANCIS G. FLEMING

FGF/rc

Letter dated July 14, 1980, Court of Appeals of the State of New York, to Francis Gerard Fleming.

STATE OF NEW YORK
COURT OF APPEALS

(SEAL)

JOSEPH W. BELLACOSA
Clerk of the Court

Clerk's Office
Albany 12207
July 14, 1980

Mr. Francis Gerard Fleming
99 Park Avenue
New York, New York 10016

In the Matter of the Application
of FRANCIS GERARD FLEMING
for waiver of strict compliance
with the practice requirement of
22 NYCRR 520.7(a)(2).

Dear Mr. Fleming:

I am directed by the Court of Appeals to advise you that your petition in the above captioned proceeding verified June 30, 1980, has been denied.

Very truly yours,

JOSEPH W. BELLACOSA
Joseph W. Bellacosa

AO'B:tab

Notice of Appeal.

NEW YORK COURT OF APPEALS

In the Matter of the Application
for Admission to the Bar of

FRANCIS GERARD FLEMING

To: THE NEW YORK COURT OF APPEALS

PLEASE TAKE NOTICE that Francis Gerard Fleming (hereafter appellant), hereby appeals the decision of the New York Court of Appeals denying his "Application for Determination Regarding Combined or Cumulative Practice of Law for Admission Without Examination" to the United States Supreme Court.

This appeal is taken pursuant to 28 U.S.C. § 1257(2). No formal judgment or written order has been entered and filed in this matter by the New York Court of Appeals despite appellant's written request for judgment or order; however, the decision appealed from is contained in the letter of the Clerk of the Court to appellant dated July 14, 1980 preliminarily denying appellant's application, and the letter of the Clerk of the Court to appellant dated September 4, 1980 finally denying appellant's application upon his request for clarification and reconsideration.

Dated: November 25, 1980

Respectfully submitted,

KREINDLER & KREINDLER

By: PAUL EDELMAN
Lee S. Kreindler
Paul S. Edelman

FRANCIS G. FLEMING
Francis Gerard Fleming
99 Park Avenue
New York, New York 10016

Filed: November 26, 1980

Certificate of Service.

PAUL S. EDELMAN, a member of the Bar of the United States Supreme Court, whose entry of appearance in this cause is being contemporaneously filed with the Clerk of the United States Supreme Court, being first duly sworn and placed upon his oath states that a copy of this Notice of Appeal and the attached Certificate of Service was deposited November 25, 1980 in a U.S. Post Office or mail box with first-class postage prepaid, addressed to the following persons:

Clerk of the Court
New York Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

Honorable Lawrence H. Cooke
Court of Appeals Chambers
County Courthouse
Monticello, New York 12701

Honorable Matthew J. Jasen
Erie County Hall
Buffalo, New York 14202

Honorable Domenick L. Gabrielli
Court of Appeals Chambers
Bath, New York 14810

Honorable Hugh R. Jones
Court of Appeals Chambers
Oneida City Courthouse
Utica, New York 13501

Certificate of Service.

Honorable Sol Wachtler
Supreme Court Building
Mineola, New York 11501

Honorable Jacob D. Fuchsberg
50th Floor
233 Broadway
New York, New York 10007

Honorable Bernard S. Meyer
Court of Appeals Chambers
36 W. 44th Street
New York, New York 10036

Attorney General for the State of New York
Capitol Building
Albany, New York 12224

PAUL EDELMAN .
Paul S. Edelman

Sworn to before me this
25th day of November, 1980

MARIA ANGRI
Notary Public

MARIA ANGRI
Notary Public, State of New York
No. 4723373
Qualified in Kings County
Term Expires March 30, 1982

Application of Francis G. Fleming, for Determination Regarding Combined or Cumulative Practice of Law for Admission Without Examination.

NEW YORK COURT OF APPEALS

In the Matter of the Application
for Admission to the Bar of

FRANCIS GERARD FLEMING

To: NEW YORK COURT OF APPEALS

FRANCIS G. FLEMING, residing at 99 Park Avenue, New York, New York 10016, by virtue of his employment with Kreindler & Kreindler, by the authority of:

a. N.Y. Judiciary Law, §§ 90 and 460 *et seq.;*

b. The *Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law,* 22 N.Y. Codes, Rules and Regulations, Part 520; and

c. N.Y. Court Rules, New York Supreme Court, Appellate Division, First Department, Part 602

presents this application to the New York Court of Appeals in connection with his petition for admission as an attorney and counselor at law without examination, seeking this Court's determination that applicant's five years of combined or cumulative practice or legal service is the equivalent of actual practice for at least five years in the highest law court or highest court of original jurisdiction in which applicant is admitted.

In support thereof, applicant shows the Court the following:

a. Applicant, Francis G. Fleming, has been admitted to practice in the highest law court of the Commonwealth of Pennsylvania since November 18,

1974 (See Appendix 1 attached to and made a part hereof), and the highest law court of the State of Arizona since December 18, 1975 (See Appendix 2 attached to and made a part hereof); and,

b. While admitted to practice in Pennsylvania and Arizona, applicant has engaged in actual practice or legal service for a period of at least five years in a combination or cumulation of practice or legal service in the following respects:

1. From September 1, 1974 until August 31, 1975, in the federal civilian legal service in a position which requires admission to the Bar for appointment thereto or for performance of the duties thereof, namely, a federal judicial law clerk; and

2. From September 1, 1975, until the present, in actual practice or legal service the highest law court or highest court of original jurisdiction of the Commonwealth of Pennsylvania, the State of Arizona, the Courts of the United States and state and federal agencies, all as more particularly described in the attached supporting affidavits of:

The Honorable Edwin D. Steel, Senior U.S. District Court Judge for the District of Delaware;

Roderick G. McDougall, Chief Assistant Attorney General, Office of the Attorney General for the State of Arizona;

Charles D. Roush, President, Treon, Warnicke, Dann & Roush, P.A., 919 North First Street, Phoenix, Arizona; and

Applicant, Francis G. Fleming.

Application of Francis G. Fleming, for Determination Regarding Combined or Cumulative Practice of Law for Admission Without Examination.

Alternatively, pursuant to Rule 520.9 applicant requests this Court to exercise its discretion to waive strict compliance with the Rules of the Court regarding admission of attorneys without examination for the reason that it would constitute undue hardship to the applicant to require him to submit to a third bar examination in view of the scores attained by applicant in the 1974 and 1975 Multi-State Bar Examinations, and the nature of his legal experience since his initial admission to the Pennsylvania Bar on November 18, 1974 adequately manifests the requisite competence for admission as an attorney and counsellor at law.

A Memorandum of Law in Support of the Application is also submitted for the convenience of this Court.

WHEREFORE, applicant requests this Court to issue its Order determining that applicant's five years of combined or cumulative service is the equivalent of actual practice or legal service in the highest law court or highest court of original jurisdiction of the Commonwealth of Pennsylvania, a jurisdiction in which applicant has been admitted for at least five years; alternatively, applicant requests this Court to waive strict compliance with the Rules of the Court relating to the admission of attorneys without examination and to issue its order permitting applicant to be admitted without examination on the basis of his previous Multi-State Bar Examination scores and the nature of his experience since initial admission to the Pennsylvania Bar on November 18, 1974 for the reason that applicant has adequately manifested that he is professionally competent to engage in the practice of law.

Application of Francis G. Fleming, for Determination Regarding Combined or Cumulative Practice of Law for Admission Without Examination.

This 30 day of June, 1980

Respectfully submitted,

FRANCIS G. FLEMING
Francis G. Fleming

KREINDLER & KRELINDER

By: PAUL S. EDELMAN
Paul S. Edelman
Member of the Firm
99 Park Avenue
New York, N. Y. 10016

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

FRANCIS G. FLEMING, being duly sworn, deposes and says that he is the petitioner in the within application; that he has read the foregoing petition and knows the contents thereof; and that the same is true to his knowledge, except as to matters therein stated to be alleged on information and belief, and that as to the matters, he belives them to be true.

FRANCIS G. FLEMING
Francis G. Fleming

Sworn to before me this
30th day of June, 1980

CHRISTIANE CAURANT
Notary Public

CHRISTIANE CAURANT
Notary Public, State of New York
No. 41-4643422
Qualified in Queens County
Commission Expires March 30, 1981

Memorandum in Support of Application for Admission Without Examination.

NEW YORK COURT OF APPEALS

In the Matter of the Application for Admission to the Bar of

FRANCIS GERARD FLEMING

I. *Introduction*

* * * *

II. *Summary of Applicant's Background and Experiences*

* * * *

III. *Applicant's Residency Since June 1, 1979 While Practicing Law Should Not Be Relevant to Whether the Nature of His Experience Is the "Equivalent" of Actual Practice in Pennsylvania.*

* * * *

IV. *A State May Not Constitutionally Restrict An Individual From Engaging In His Chosen Profession Within Its Borders Solely On the Basis of Residence.*

As this Court has recently pointed out:

> While the precise reach of the [privilege and immunities] clause must await further clarification, it is settled that a state may not premise an individual's right to engage in his chosen occupation within its borders solely on residence." *Gordon* v. *Committee on Character and Fitness, supra* at ——, 422 N.Y.S. 2d at 644, 397 N.E.2d ——.

Memorandum in Support of Application for Admission Without Examination.

Residence as a factor in relation to bar admission has been accurately characterized as being an antiquated remnant of protectionist trade barriers of days past. Note, 56 *Cornell L.Rev.* 831 (1974). Although it is readily conceded that a State possesses a regulatory interest in protecting the public from incompetent lawyers, the means adopted must be narrowly drawn and the least restrictive alternative available. *See Hicklin* v. *Orbeck,* 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed. 2d 397 (1978).

Even if it could be colorably argued that the *Lerch* rule related to some undefined evil, it throws the baby out with the bath water and is unfairly arbitrary in relation to any regulatory purpose. Indeed, "[n]o valid reason [has ever been] proffered as to why admission to practice law before the courts of this State must be made dependent upon residency." *Gordon* v. *Committee on Character and Fitness, supra at* ——, 422 N.Y.S.2d at 646, 397 N.E.2d at ——.

The absence of a rational basis for tying residence to competence is tacitly admitted in the Court rules inasmuch as it is clear that *no* residence requirement applies to experience obtained in federal government service. 22 N.Y.C.R.R. § 520.7(a)(2)(d). How residence can be substantively relevant to a lawyer in state governmental or private practice but not a lawyer working for the federal government is unknown. Such a distinction must not have been intended, and should not be implied or assumed.

Moreover, the opportunity to relocate among the several states has been found to be a fundamental right of national citizenship, *Shapiro* v. *Thompson,* 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed. 2d (1966). Restrictions imposed by any state which hamper this fundamental right to interstate movement can only be sustained if they are *necessary* to effectuate a *compelling* governmental interest.

> "In moving from State to State or to the District of Columbia [a citizen is], exercising a constitutional

right, and any classification which serves to penalize the exercise of that right, unless shown to be *necessary* to promote a *compelling* governmental interest, is unconstitutional." *Id.* at 634, 89 S. Ct. .at ——, 122 L.Ed. 2d a 615. (emphasis supplied).

The applicant's legal experience discloses that his professional life has coincided with the exercise of his right to relocate among the states; from New York (his legal residence at the time of separation from military service) to Pennsylvania (his residence during law school and while a law clerk), to Arizona (where he acquired most of his legal experience) and back to the New York state metropolitan area (where he is presently employed). Clearly, that he has exercised his fundamental right to move among the states cannot be used to penalize his application for admission in the absence of a strong governmental necessity. None exists here!

In view of these constitutional limitations, disregarding any of Mr. Fleming's work experience because of his residence would arbitrarily deny him the opportunity to engage in his chosen profession in this state and impermissibly chill the exercise of the right to interstate travel. Mr. Fleming's suitability for admission without examination should be ascertained on the basis of the qualitative nature of his experience and the fact that he has already achieved exemplary scores on two previous bar examinations. If Mr. Fleming's experience would have been treated as sufficient to qualify him for admission without examination had it occurred while he resided in Pennsylvania, the application should, indeed must, be granted.

Memorandum in Support of Application for Admission Without Examination.

V. *Even If Mr. Fleming's Experience Does Not Constitute Strict Compliance With the Court Rules. It Would Cause Undue Hardship to Require Him to Pass a Third Bar Examination and Strict Compliance Should be Waived.*

* * * *

CONCLUSION

For the reasons set forth herein, this Court should find that Mr. Fleming's experience is the equivalent of five years actual practice in Pennsylvania and enter the Order requested permitting Mr. Fleming's admission without examination.

Dated: New York, New York
June 30, 1980

Respectfully submitted,

KREINDLER & KREINDLER
By: PAUL S. EDELMAN
Paul S. Edelman
A Member of the Firm
99 Park Avenue
New York, N.Y. 10016